

The Role of Recklessness in American Systems of Comparative Fault

Confusion now hath made his masterpiece!

William Shakespeare
Macbeth. Act ii, sc. 3

I. INTRODUCTION

Perhaps the most significant change visited upon American negligence law during the twentieth century has been the growth of comparative fault.¹ Born out of a desire to ameliorate the severity of the contributory negligence doctrine,² comparative fault allows a fact finder to allocate the relative degrees of fault attributable to the parties and to diminish the plaintiff's recovery accordingly. Its adoption has necessitated a dramatic reworking of negligence doctrines that arose as contributory negligence developed. These doctrines (last clear chance,³ various degrees of negligence,⁴ and recklessness) date back almost as far as negligence itself and arose, as comparative fault, primarily as a palliative of the harsh contributory negligence bar.

1. The phrase "comparative fault" is used throughout this Comment as subsuming the concept of "comparative negligence." "Comparative fault" is a broader term, at least arguably encompassing comparison not only of negligence but also of other sorts of tortious conduct (e.g., recklessness, strict liability, and perhaps even intentional conduct). A system of comparative negligence, in a strict sense, arguably would permit only the comparison of ordinary negligence. While the difference between the two concepts is significant, especially with respect to the treatment of recklessness, determining the appropriate label in individual cases has proven most difficult. Most jurisdictions that have adopted systems of comparative fault, whether they have titled them "comparative fault" or "comparative negligence," have not decided, either judicially or legislatively, the extent to which the systems will apply to types of fault other than negligence. While the use of the term "comparative fault" throughout this Comment arguably is prejudicial (being suggestive of allowing comparison of ordinary negligence with recklessness), it has proved the only viable alternative: although some states today clearly have systems of comparative fault and some clearly have systems that compare only negligence, the issue remains unresolved in most U.S. jurisdictions. Therefore, unless the legislature or the judiciary in a particular jurisdiction has made it clear that a particular system is designed to compare only negligence, the broader "comparative fault" term will be used. The reader, however, should not discount the possibility that particular jurisdictions will elect at a later time to restrict their comparative fault schemes to comparisons of negligence alone.

2. At common law a plaintiff's contributory negligence constituted a complete bar to recovery. Courts quickly realized that in many instances, completely barring a contributorily-negligent plaintiff's recovery worked a harsh injustice on plaintiffs who sought recovery against defendants who clearly were preponderant wrongdoers. See generally Turk, *Comparative Negligence on the March*, 28 CHI. - KENT L. REV. 189, 203-07 (1950), for a discussion of attempts to mitigate the severity of the contributory negligence bar.

3. See generally W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* § 66 (4th ed. 1971), for a discussion of the origin and role of the last clear chance doctrine.

4. See *infra* note 24.

Recklessness, one of the doctrines affected, is called by a number of different names (recklessness, gross negligence,⁵ willful⁶ misconduct, wanton misconduct, and willful and wanton misconduct) in different U.S. jurisdictions.⁷ Recklessness generally is seen as the intentional doing of an act of an unreasonable character in disregard of a risk that is known to the actor or is so obvious that he must be taken to have been aware of it, and is so great that it is highly probable that harm will follow.⁸ The *Restatement (Second) of Torts* defines recklessness using the following language:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.⁹

At common law a defendant's recklessness made it impossible for him to invoke the plaintiff's contributory negligence in order to bar the plaintiff's recovery.¹⁰ Naturally, a plaintiff's recklessness completely prevented him from recovering from either a reckless or a negligent defendant.¹¹

Perhaps more so than contributory negligence, assumption of risk, and last clear chance, recklessness has posed thorny problems for courts and legislatures dealing with the question of the doctrine's future under comparative fault. Most, if not all, of the state legislatures enacting comparative

5. Considerable difference of opinion exists with respect to the difference, if any, between gross negligence and recklessness. Significant legal territory exists between intentional wrongdoing and ordinary negligence, along with a fair amount of confusion about how properly to label it. Some authorities and some courts have said that the distinct concepts of gross (or aggravated) negligence and recklessness both occupy this area. See W. PROSSER, *supra* note 3, § 34, at 183, § 65, at 426. Other courts and other authorities appear to equate these two concepts. *Id.* The *Restatement (Second) of Torts* does not mention gross negligence, but a comment to the Restatement does refer to two types of recklessness, differentiated by the existence or nonexistence of an appreciation by the actor of the high degree of risk involved. RESTATEMENT (SECOND) OF TORTS § 500 comment a (1965).

6. Many authorities spell this word "wilful." "Willful" remains the preferred spelling. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2617 (1961). It will be used throughout this Comment.

7. The various labels that have been applied to the recklessness doctrine, particularly "willful (or willful and wanton) misconduct" have led to considerable confusion. See V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 5.3, at 104 (1974). The term "willful" tends to suggest intentional wrongdoing, when in fact the requisite state of mind for recklessness differs significantly from that involved in an intentional tort. At least one court actually has equated "willful" in this context with "knowing" or "intentional." *Farmers Ins. Exch. v. Village of Hewitt*, 274 Minn. 246, 257, 143 N.W.2d 230, 238 (1966) (As Professor Schwartz observes, this court subsequently defined "willful" as "reckless" in the same case, demonstrating the inconsistency of its approach. V. SCHWARTZ, *supra* § 5.3, at 104 n.29.). Most courts, however, have tended to equate willful misconduct with wanton or reckless conduct. See 45 WORDS AND PHRASES 504-05, 528-30 (1970). Professor Schwartz has suggested that in order to alleviate some of the confusion regarding the intent element of willful misconduct, the doctrine might more appropriately be labeled "negligent willful misconduct." V. SCHWARTZ, *supra*, § 5.3, at 105. In the interest of simplicity and uniformity, the term "recklessness" is substituted for "willful misconduct" throughout this Comment, even in discussions of cases that employ the "willful misconduct" terminology.

8. W. PROSSER, *supra* note 3, § 34, at 185.

9. RESTATEMENT (SECOND) OF TORTS § 500 (1965).

10. W. PROSSER, *supra* note 3, § 34, at 184-85.

11. V. SCHWARTZ, *supra* note 7, § 5.5, at 111.

fault statutes have ignored the question.¹² The courts that have confronted the issue have split on the outcome, some holding that recklessness is a bar to recovery under comparative fault and some, perhaps a small majority, holding that it is not.¹³ The decisions in the area, relatively few in number, have been marked by the absence of systematic analysis of the problem. Rather, the decisions appear somewhat result-oriented, the outcomes regarding the future of recklessness in many instances seemingly arrived at as a consequence of, rather than a reason for, the courts' ultimate decisions regarding who should prevail and by what amount.

A recurring question in the opinions is whether recklessness is fault of a different degree than ordinary negligence, or whether it amounts to fault of a different kind altogether. Courts subscribing to the degree theory have viewed recklessness as comparable with ordinary negligence and accordingly have held that reckless conduct simply should be considered as an additional factor by fact finders making determinations of comparative fault.¹⁴ Conversely, courts subscribing to the theory that recklessness is a different kind of fault altogether have held that because of this difference in kind, recklessness and ordinary negligence are not subject to comparison under comparative negligence systems.¹⁵ The consequence of finding recklessness to differ in kind from negligence is that a reckless defendant may not use the plaintiff's contributory negligence to diminish his recovery, and a reckless plaintiff may not recover at all—the same results that obtained at common law.¹⁶

This Comment will trace the development of recklessness at common law and will summarize its status in American jurisdictions that have adopted comparative fault. It will analyze the American cases that have addressed the issue and will attempt to unravel some of the confusion that has surrounded the kind-degree distinction. Last, it will suggest means by which courts might undertake more systematic analyses of the status of recklessness in comparative fault systems. The Comment will not address two of the more complex issues collaterally related to recklessness: (a) recklessness comparisons involving multiple parties (*e.g.*, a case wherein a contributorily negligent plaintiff sues three defendants, two of whom were reckless), and (b) the comparison of recklessness with types of fault other than negligence (*e.g.*, strict liability or intentional torts).

12. The words "if not all" in the text accompanying this note refer to a small number of states, including Arkansas, Maine, and Oregon, whose comparative fault statutes use the word "fault" rather than "negligence," and might, therefore, be said to have intended comparison of recklessness to the extent that that concept is subsumed by the term "fault." See ARK. STAT. ANN. §§ 27-1763 to -1765 (1979); ME. REV. STAT. ANN. tit. 14, § 156 (1980); OR. REV. STAT. § 18.470 (1979). New York, whose statute refers to "culpable conduct," is another state whose legislature at least arguably has addressed the issue. N.Y. CIV. PRAC. LAW § 1141 (McKinney 1976).

13. See *infra* text accompanying notes 36–151 (for a detailed discussion of all of these cases).

14. See, *e.g.*, *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962) (see *infra* text accompanying notes 36–43).

15. See, *e.g.*, *Davies v. Butler*, 95 Nev. 763, 602 P.2d 605 (1979) (see *infra* text accompanying notes 76–93).

16. V. SCHWARTZ, *supra* note 7, § 5.3, at 105; § 5.5, at 111.

II. RECKLESSNESS AT COMMON LAW

The doctrine of contributory negligence, adopted in England in 1809¹⁷ and first adopted in an American jurisdiction in 1824,¹⁸ received significant judicial support during the *laissez faire* era of the Industrial Revolution. The doctrine's popularity largely was due to the fashion in which it facilitated the growth of railroads and industry through the limitation of personal injury claims.¹⁹ The outstanding feature of the doctrine, as indicated above, was that the plaintiff's contributory negligence operated as a complete bar to his recovery, provided that it had in any measure contributed to his injury.²⁰ Contributory negligence came under increasing attack during the twentieth century due to the harsh manner in which it frequently deprived a plaintiff of recovery from a tortfeasor who was much more negligent than he.²¹ Being a complete defense, contributory negligence did not simply reduce a plaintiff's damages; it forced him to assume the entire loss, even though the defendant clearly may have been the greater wrongdoer.²²

As judicial discontent with the harshness of the contributory negligence bar grew, courts searched for ways to ameliorate its effect. This search led to the creation of the doctrine of last clear chance²³ as well as a brief flirtation in some American jurisdictions with degrees of negligence.²⁴ It also led to rules disallowing the use by a defendant of the contributory negligence bar when he had violated a statute designed to protect a class of which the plaintiff was a member.²⁵ Lastly, it led to the adoption of the doctrine of recklessness.²⁶

Under noncomparative systems of negligence, the recklessness doctrine, by merely shifting the entire burden of the loss from plaintiff to defendant, in many instances functioned with practically the same degree of inequity as had

17. *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809). See H. WOODS, *COMPARATIVE FAULT: THE NEGLIGENCE CASE* § 1:3, at 6 (1978).

18. *Smith v. Smith*, 19 Mass. (2 Pick.) 621 (1824). See H. WOODS, *supra* note 17, § 1:3, at 7.

19. See generally H. WOODS, *supra* note 17, §§ 1:3-1:6, for a discussion of this aspect of the growth of contributory negligence.

20. See W. PROSSER, *supra* note 3, § 65; Turk, *supra* note 2, at 199.

21. See Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L. Q. 333 (1932); Turk, *supra* note 2, at 199-203; Whelan, *Comparative Negligence*, 1938 WIS. L. REV. 465, 467-68; Comment, *Comparative Negligence in Louisiana*, 11 TUL. L. REV. 112 (1936). Indeed, Dean Leon Green labeled contributory negligence "the harshest doctrine known to the common law of the nineteenth century." Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36 (1944).

22. Turk, *supra* note 2, at 199-200 (citing Comment, *supra* note 21, at 122-23).

23. See *supra* note 3.

24. See generally W. PROSSER, *supra* note 3, § 34; Elliott, *Degrees of Negligence*, 6 S. CAL. L. REV. 91, 135 (1933); *The Three Degrees of Negligence*, 8 AM. L. REV. 649 (1874). The degrees of negligence approach involved a categorization of negligence into slight, ordinary, and gross negligence. As an integrated system, the approach functioned as a crude form of comparative negligence and received a fair degree of support in the bailment context. It rapidly fell from favor, however, when employed in nonbailment negligence cases. See W. PROSSER, *supra* note 3, § 34. Vestiges of the system remain, however. While slight negligence is not employed at present (except in a de facto sense in modern systems of comparative fault), all American jurisdictions employ ordinary negligence, and a number have retained gross negligence or a variation thereof.

25. See V. SCHWARTZ, *supra* note 7, § 1.2(A), at 5.

26. See *id.*; H. WOODS, *supra* note 17, § 1:6, at 12-13; Turk, *supra* note 2, at 203-04.

the contributory negligence bar it was designed to ameliorate.²⁷ The absence of adequate means of equitably allocating losses within the context of common-law negligence was a major impetus in the push for the adoption of comparative fault.²⁸

III. RECKLESSNESS UNDER EVOLVING SYSTEMS OF COMPARATIVE FAULT: THE DILEMMA

Despite the significant opposition to the contributory negligence doctrine, the adoption of comparative fault as a substitute for the doctrine in American jurisdictions was slow in coming. Prior to 1969 only seven American jurisdictions had adopted comparative fault.²⁹ It was not until 1969 that the adoption of comparative fault gained momentum.³⁰ Between 1969 and 1981, largely in response to a perceived need to distribute more adequately the costs of automobile accidents and to a strenuous promotion of no fault insurance,³¹ a flood of American jurisdictions adopted systems of comparative fault. At the time of this writing systems of comparative fault exist in at least thirty-eight American jurisdictions, plus Puerto Rico and the Virgin Islands.³² Most of these jurisdictions legislatively adopted the doctrine.³³ Seven did so judicially.³⁴

The rapid development of comparative fault has left the future of the

27. See Turk, *supra* note 2, at 204, where the author observes that the difficulty in distinguishing recklessness from negligence was a major reason that the recklessness doctrine was unsuccessful in mitigating the severity of the contributory negligence rule.

28. See *supra* note 21.

29. V. SCHWARTZ, *supra* note 7, § 1.1, at 1.

30. *Id.* § 1.1, at 2.

31. *Id.* § 1.4, at 15 n.15; Wade, *Uniform Comparative Fault Act*, 14 FORUM 379, 380 (1979).

32. V. SCHWARTZ, *supra* note 7, § 1.1 (Supp. 1981). See also H. WOODS, *supra* note 17, § 1.11 (Supp. 1981) (discussing *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981), which was decided after the publication of Professor Schwartz' supplement).

33. The statutes adopting comparative fault for U.S. jurisdictions are: ARK. STAT. ANN. §§ 27-1763 to -1765 (1979); COLO. REV. STAT. § 13-21-111 (1973 & Supp. 1981); CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1981); GA. CODE ANN. §§ 66-402 (1979), 94-703 (1978), 105-603 (1968); HAWAII REV. STAT. § 663-31 (1976); IDAHO CODE §§ 6-801 to -806 (1979); KAN. STAT. ANN. §§ 60-258a, -258b (1976); LA. CIV. CODE ANN. art. 2323 (West Supp. 1982); ME. REV. STAT. ANN. tit. 14, § 156 (1980); MASS. ANN. LAWS ch. 231, § 85 (Michie/Law. Co-op. 1974); MINN. STAT. ANN. § 604.01 (West Supp. 1982); MISS. CODE ANN. § 11-7-15 (1972); MONT. CODE ANN. § 27-1-702 (1981); NEB. REV. STAT. § 25-1151 (1979); NEV. REV. STAT. § 41.141 (1979); N.H. REV. STAT. ANN. § 507:7-a (Supp. 1979); N.J. STAT. ANN. §§ 2A:15-5.1 to .3 (West Supp. 1981); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); N.D. CENT. CODE § 9-10-07 (1975); OHIO REV. CODE ANN. § 2315.19 (Page 1981); OKLA. STAT. ANN. tit. 23, §§ 13-14 (West Supp. 1981); OR. REV. STAT. § 18.470 (1979); PA. STAT. ANN. tit. 42, § 7102 (Purdon Supp. 1981); R.I. GEN. LAWS § 9-20-4 (Supp. 1981); S.D. CODIFIED LAWS ANN. § 20-9-2 (1979); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1981); UTAH CODE ANN. § 78-27-37 (1977); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1981); WASH. REV. CODE ANN. § 4.22.005 (Supp. 1982); WIS. STAT. ANN. § 895.045 (West Supp. 1978); WYO. STAT. § 1-1-109 (1977). See also H. WOODS, *supra* note 17, where all of the statutes listed here are printed in full in the appendix.

34. The seven cases adopting comparative fault for U.S. jurisdictions are: *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); *Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979); *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981); and *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979). See also V. SCHWARTZ, *supra* note 7, § 1.1 (& Supp. 1981); H. WOODS, *supra* note 17, § 1:11 (& Supp. 1981).

doctrine of recklessness in a state of considerable uncertainty. None of the statutes adopting comparative fault in American jurisdictions directly addresses the question of the future of recklessness. Similarly, the decisions of the seven state supreme courts that have adopted comparative fault are largely devoid of references to the recklessness question.

This state of uncertainty has left trial courts and intermediate courts of appeal with something of a dilemma: in negligence cases in which at least one of the parties has been reckless,³⁵ should that party's recklessness continue to have an all-or-nothing effect? If so, it would prevent the reckless defendant from raising the plaintiff's contributory negligence as a defense and would bar recovery by the reckless plaintiff. Alternatively, should recklessness simply be considered by the fact finder as another factor in making its allocation of fault? Indeed, what criteria should even be used in deciding the question?

IV. THE CASES

Roughly a dozen American courts have confronted the question of the role of recklessness under comparative fault systems and, in a manner perhaps indicative of the confusion existent in this area of the law, have split on the outcome.

A. Wisconsin

While most of these decisions are relatively recent, the earliest ones date back as far as the 1962 decision of the Wisconsin Supreme Court in *Bielski v. Schulze*.³⁶ In *Bielski*, which arose out of an automobile accident, the Wisconsin Supreme Court reexamined the viability of the gross negligence doctrine in the state. Wisconsin courts are not among those that have recognized a distinction between gross negligence and recklessness.³⁷ Indeed, prior Wisconsin decisions had described grossly negligent parties as acting "rashly," "recklessly," and "wantonly."³⁸ Under state law prior to *Bielski*, gross negligence functioned in a manner identical to that in which recklessness functioned in other jurisdictions: it constituted an all-or-nothing bar to recovery.³⁹ In *Bielski* the Wisconsin Supreme Court eliminated gross negligence, saying:

The history of the development of gross negligence, its reason for existing, the content of the concept, and the inequitable results and consequences of its application have led us to decide the doctrine of gross negligence, as we know it, should be interred in the limbo of jurisprudence along side the doctrine of assumption of risk in negligence cases.⁴⁰

35. The existence of recklessness generally is seen as a question of fact. See 57 AM. JUR. 2D *Negligence* § 107 (1971).

36. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

37. *Id.* at 14-15, 114 N.W.2d at 112.

38. *Lockwood v. Belle City St. Ry.*, 92 Wis. 97, 113, 65 N.W. 866, 871 (1896). See also the other cases with similar holdings cited in *Bielski* at 16 Wis. 2d 1, 14-15, 114 N.W.2d 105, 112 (1962).

39. *Bielski v. Schulze*, 16 Wis. 2d 1, 16 n.25, 114 N.W.2d 105, 112 n.25 (1962) (citing *Astin v. Chicago, Minn. & St. Paul R.R.*, 143 Wis. 477, 128 N.W. 265 (1910)).

40. 16 Wis. 2d 1, 14, 114 N.W.2d 105, 111-12 (1962).

The court commenced its analysis with a discussion of the origin of the gross negligence rule. It stated that under prior Wisconsin law the basis for precluding recovery by a party guilty of gross negligence had been that the party's fault differed in kind, rather than in degree, from that of the party guilty of ordinary negligence.⁴¹ The court then proceeded to reject the viability of the gross negligence doctrine, saying that "[m]uch of what constituted gross negligence" was merely "a high percentage of ordinary negligence."⁴² In doing so the court stressed "the basic goal of the law of negligence, the equitable distribution of the loss in relation to the respective contribution of the faults causing it."⁴³

By equating gross negligence (or "much of what constituted gross negligence") with "a high percentage of ordinary negligence," the *Bielski* court implicitly rejected the idea that gross negligence differs in kind from ordinary negligence. If the court in fact had viewed gross negligence as differing in kind, it presumably would not have included gross negligence in its "ordinary negligence" category. Indeed, the court's "high percentage" characterization strongly suggests a degree approach.

B. Arkansas

In 1966 a federal court applying Arkansas law reached a similar result. *Billingsley v. Westrac Co.*⁴⁴ arose out of a traffic accident.⁴⁵ The United States Court of Appeals for the Eighth Circuit, in an opinion by Circuit Judge Harry Blackmun,⁴⁶ held that even if the defendant's conduct had been "willful and wanton" (which was neither alleged nor proved in the trial court),⁴⁷ it still would be compared with the decedent's contributory negligence under the Arkansas comparative fault statute.⁴⁸ The majority said it felt persuaded that the Arkansas Supreme Court would similarly apply the statute when faced with the question.⁴⁹

The court sided with the *Bielski* court on the kind-degree question. Indeed, without actually saying so, the court based its decision on the kind-degree distinction. Although recognizing that "it has been said that willful misconduct is not, properly speaking, within the meaning of the term 'negligence,'" ⁵⁰ the court cited a number of Arkansas cases as authority to the

41. *Id.* at 16, 114 N.W.2d at 112. *But see id.* at 14-15 n.18, 114 N.W.2d at 112 n.18 (The court cites six of its cases, decided between 1853 and 1896, that speak of gross negligence as differing in degree from ordinary negligence.).

42. *Id.* at 17, 114 N.W.2d at 113.

43. It is worthy of note that the system of comparative fault existing in Wisconsin at the time of *Bielski* was a partial comparative fault system of the Arkansas variety (*see infra* note 117). In 1971 Wisconsin switched to the New Hampshire variety of partial comparative fault, allowing recovery to plaintiffs whose fault was found to equal exactly that of the defendant. *See* WIS. STAT. ANN. § 895.045 (West 1966 & Supp. 1981).

44. 365 F.2d 619 (8th Cir. 1966).

45. The accident occurred at night. Plaintiff's decedent struck defendant's unlit tractor trailer, which was blocking both lanes and both shoulders of a highway as its driver attempted a U-turn. *Id.* at 620-21.

46. Mr. Justice Blackmun now sits on the U.S. Supreme Court.

47. 365 F.2d 619, 622 (8th Cir. 1966).

48. *Id.* at 623.

49. *Id.*

contrary.⁵¹ The Arkansas approach, amply demonstrated in the state's guest statute cases,⁵² was to equate "willfully and wantonly" and "wilful misconduct" with "willful and wanton negligence" or some other negligence phraseology.⁵³ The court cited the language of the Arkansas Supreme Court in *Harkrider v. Cox*⁵⁴ as typifying the Arkansas approach: "'We do not agree that willful and wanton disregard or misconduct is an area, or field, of law entirely distinct and apart from negligence. Our previous opinion several times mentions 'willful and wanton negligence.' 'Willful and wanton negligence' and 'willful and wanton disregard' are synonymous in meaning . . .'"⁵⁵ Lastly, the court expressed its own support for the Arkansas approach, suggesting it to be the only approach consistent with the policies underlying comparative negligence: "We note, too, the added factor that the purpose of a comparative negligence statute is thwarted whenever there is a judicial characterization of an act as something other than negligence."⁵⁶

The Arkansas Legislature in 1973 effectively adopted the *Billingsley* court's position on this issue. In a revised statute adopted that year the word "fault" was used in place of the word "negligence," and "fault" was defined to include "willful and wanton conduct."⁵⁷

C. New Jersey

Most of the other decisions in this area are of much more recent vintage. In 1976 the Law Division of the Superior Court of New Jersey considered the question in *Draney v. Bachman*.⁵⁸ The case involved an effort by an injured automobile passenger to amend her complaint to allege "gross negligence or wanton and willful conduct" on the part of the defendant driver.⁵⁹ The court elected to "disregard the comparative negligence statute when dealing with willful and wanton conduct, but to apply it to all 'degrees' of negligence, dropping any distinction between 'gross' and other negligence."⁶⁰ In doing

51. 365 F.2d 619, 623 (8th Cir. 1966).

52. Arkansas' guest statutes, ARK. STAT. ANN. §§ 75-913, -915 (1979), employ the words "willfully and wantonly operated" and "wilful misconduct."

53. 365 F.2d 619, 623 (8th Cir. 1966).

54. 232 Ark. 165, 334 S.W.2d 875 (1960).

55. 365 F.2d 619, 623 (8th Cir. 1966) (quoting *Harkrider v. Cox*, 232 Ark. 165, 169, 334 S.W.2d 875, 877 (1960)).

56. 365 F.2d 619, 623 (8th Cir. 1966). Professor Schwartz has correctly labeled this language "a bit conclusory," noting that "[s]tate legislatures have left little written history to show the purpose behind comparative negligence statutes." V. SCHWARTZ, *supra* note 7, § 5.3, at 107.

57. ARK. STAT. ANN. §§ 27-1763, -1764 (1979). The 1973 act specifically defined "fault" to include "willful and wanton conduct." V. SCHWARTZ, *supra* note 7, § 5.3, at 107. A 1975 amendment omitted the "willful and wanton" language, but incorporated a very broad definition of fault including "any act, omission, [or] conduct . . . which is a proximate cause of any damages sustained by any party." ARK. STAT. ANN. §§ 27-1763, -1764 (1979). Professor Schwartz is quick to observe that the adoption of the 1973 enactment "does not necessarily indicate that the 1961 legislature intended the same result when it enacted the statute under which *Billingsley* was decided." V. SCHWARTZ, *supra* note 7, § 5.3, at 108.

58. 138 N.J. Super. 503, 351 A.2d 409 (Super. Ct. Law Div. 1976). The *Draney* decision is discussed in a comment at 8 RUT.-CAM. L. REV. 376 (1977).

59. 138 N.J. Super. 503, 505, 351 A.2d 409, 410 (Super. Ct. Law. Div. 1976).

60. *Id.* at 508, 351 A.2d at 412.

so the court frankly acknowledged its differences with the *Bielski* and *Billingsley* courts and relied on prior New Jersey case law holding that willful and wanton conduct differed in kind, rather than degree, from ordinary negligence.⁶¹ The court, in abolishing gross negligence, observed that although Wisconsin had in name abolished only gross negligence, it had in fact abolished willful misconduct as well.⁶² The *Draney* court also cited two recent New Jersey cases that "apparently elevated to the status of a separate tort, the claim of willful, wanton and reckless conduct,"⁶³ as well as one commentator who agreed with the court's view on the willful misconduct issue.⁶⁴ The court concluded that the legislature apparently was not contemplating the comparison of willful and wanton conduct when it enacted the state's comparative negligence statute and that the willful and wanton conduct doctrine, therefore, continued to be a viable part of New Jersey law.⁶⁵

D. Oregon

In *Johnson v. Tilden*⁶⁶ the Oregon Supreme Court addressed the question of the role of recklessness in the context of a guest statute case. The court concluded, based largely on legislative history, that comparative fault principles would apply to cases based on gross negligence.⁶⁷ Gross negligence in Oregon is equated with "reckless disregard" as that term is defined in the *Restatement (Second) of Torts*.⁶⁸

A 1975 amendment to the Oregon comparative negligence statute had substituted the word "fault" for the word "negligence."⁶⁹ The legislative history relied upon by the court suggested that the amendment was intended to broaden the types of fault covered by the statute.⁷⁰ Although the holding in

61. *Id.* at 512-13, 351 A.2d at 414 (citing *Tabor v. O'Grady*, 61 N.J. Super. 446, 161 A.2d 267 (Super. Ct. App. Div. 1960)).

62. 138 N.J. Super. 503, 512, 351 A.2d 409, 414 (Super. Ct. Law Div. 1976). But see *Davies v. Butler*, 95 Nev. 763, 602 P.2d 605 (1979), which erroneously concluded that the *Bielski* court was dealing with gross negligence alone. For a discussion of this aspect of the *Davies* opinion, see *infra* note 91.

63. 138 N.J. Super. 503, 513, 351 A.2d 409, 414-15 (Super. Ct. Law Div. 1976) (citing *McLaughlin v. Rova Farms Inc.*, 56 N.J. 288, 266 A.2d 284 (1970); *Acken v. Campbell*, 67 N.J. 585, 342 A.2d 172 (1975)).

64. Bouchard, *Apportionment of Damages Under Comparative Negligence*, 55 MASS L.Q. 125, 139 (1970). This commentator's approach to the issue is perplexing. Relying on a 1905 Massachusetts case recognizing the kind-degree distinction, Bouchard asserts that the Massachusetts comparative negligence statute does not apply to cases involving "willful, wanton, and reckless conduct." *Id.* Yet in his conclusion Bouchard states that the new statute "renders obsolete . . . the classification of 'willful, wanton, and reckless' conduct which has long been condemned as 'unworkable,' 'weasel words' possessing 'chameleon-like characteristics.'" *Id.* at 143 (citing 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 1215 n.16 (1956)). If, as Bouchard states, the new statute does not apply to recklessness, it is difficult to imagine how it has rendered the doctrine obsolete.

65. 138 N.J. Super. 503, 514, 351 A.2d 409, 415 (Super. Ct. Law Div. 1976).

66. 278 Or. 11, 562 P.2d 1188 (1977).

67. *Id.*

68. *Williamson v. McKenna*, 223 Or. 366, 392, 354 P.2d 56, 68 (1960) (employing the definition of "reckless disregard" in RESTATEMENT (SECOND) OF TORTS § 500 (1965)).

69. OR. REV. STAT. §§ 18.470-.490 (1979). The Oregon system is a partial comparative fault system akin to that adopted in New Hampshire (plaintiff still recovers on a 50-50 verdict). See *infra* note 117. Note the similarity between this amendment and that adopted in Arkansas following the decision in *Billingsley v. Westrac Co.*, 365 F.2d 619 (8th Cir. 1966) (See *supra* note 57 and accompanying text).

70. 278 Or. 11, 17, 562 P.2d 1188, 1191 (1977).

Johnson was limited to guest statute actions, dictum in the opinion evinced a judicial intention to give broad application to the new "fault" provision:

It is our opinion that SB797 was intended from the outset to provide that comparative fault principles were to apply in actions premised on gross negligence, and that the revision which substituted the term "fault" for the reference to "negligence or gross negligence" was designed not to exclude actions based on gross negligence, but rather to include such actions, as well as any other actions based on tortious conduct, however described, in which contributory negligence is an appropriate defense.⁷¹

The United States Court of Appeals for the Ninth Circuit, ostensibly applying Oregon law in *Ryan v. Foster & Marshall, Inc.*,⁷² appears to have ignored or been unaware of the holding in *Johnson*.⁷³ In *Ryan* the court upheld a trial court determination that gross negligence could not be compared with ordinary negligence under Oregon's system of comparative fault.⁷⁴ Given the *Johnson* holding, this aspect of *Ryan* was wrongly decided. Stating that the Oregon Supreme Court had not passed on the question, the court quoted and endorsed the trial court's holding that "[i]f the Oregon legislature had intended to include gross negligence in O.R.S. § 18.470, its comparative-negligence statute, it would have been easy to do so."⁷⁵ This is the extent of the discussion of the issue by the *Ryan* court. Neither *Johnson* nor any other relevant case is cited. Given the *Johnson* holding, one would hope that neither the lower courts in Oregon nor the Ninth Circuit will be misled by the *Ryan* decision.

E. Nevada

In 1979 the Nevada Supreme Court addressed the recklessness issue in *Davies v. Butler*.⁷⁶ The court reached a conclusion opposite to that reached by the *Bielski*,⁷⁷ *Billingsley*,⁷⁸ and *Johnson*⁷⁹ courts and held, based largely on an analysis of the relevant legislation,⁸⁰ that willful or wanton misconduct would remain an all-or-nothing doctrine in Nevada.⁸¹ The case involved the death of a young man by alcohol poisoning during his initiation into a

71. *Id.* The revision referred to in the quote is to the senate bill, not to the statute. The original bill would have altered the language of the statute to provide that ordinary negligence would be compared with "negligence or gross negligence." *Id.* at 16-17, 562 P.2d at 1191.

72. 556 F.2d 460 (9th Cir. 1977).

73. Given the dates the cases were decided, it would appear that the *Ryan* court simply was ignorant of the *Johnson* holding at the time it drafted its opinion. *Johnson* was decided April 19, 1977; *Ryan* was decided on June 28, 1977.

74. 556 F.2d 460, 465 (9th Cir. 1977).

75. *Id.* The trial court's opinion was not officially reported.

76. 95 Nev. 763, 602 P.2d 605 (1979).

77. See *supra* text accompanying notes 36-43.

78. See *supra* text accompanying notes 44-55.

79. See *supra* text accompanying notes 66-70.

80. NEV. REV. STAT. § 41.141 (1979).

81. 95 Nev. 763, 769, 602 P.2d 605, 609 (1979).

social drinking club.⁸² The trial court in the case had instructed the jury that Nevada's comparative fault system could not be used to diminish plaintiff's recovery if the defendants' conduct was "intended to inflict harm."⁸³ The Nevada Supreme Court reversed, holding that the instruction should have been that Nevada's comparative fault system could not be used if defendants' conduct was "willful or wanton."⁸⁴

In determining that willful or wanton misconduct on the part of defendants would preclude their invocation of the decedent's contributory negligence to lessen or bar plaintiff's recovery, the court relied on the wording of the Nevada comparative negligence statute.⁸⁵ The court noted that the statute specifically listed "negligence" and "gross negligence" as conduct capable of being compared, but was conspicuously devoid of reference to willful or wanton misconduct.⁸⁶ The court then observed that it repeatedly had drawn a distinction between gross negligence and willful or wanton misconduct⁸⁷ and therefore concluded that "[i]n light of these decisions, it is clear that the legislature, by the use of the term 'gross negligence,' could not have contemplated that the term would include the distinct concepts of willful or wanton misconduct."⁸⁸

Had the court restricted its analysis to the statutory language, its opinion would have been logically and legally unassailable. Unfortunately, it did not. It indicated its support for the kind approach to the kind-degree question,⁸⁹ yet misrepresented the position of the California Supreme Court on the

82. According to testimony in the case, the decedent, John Davies, after drinking constantly for some 3 days as a part of his initiation, participated in a "final ceremony" in which he and others were lined up against a wall, verbally and physically hazed, and forced to drink large quantities of 190 proof "Everclear" alcohol within a 30 to 40 minute period. He was then placed in the back of a pickup truck with his fellow initiates and driven some 40 to 50 miles from Reno into the desert, where it was discovered that he had stopped breathing. Club members administered artificial resuscitation without success. While speeding back to Reno, the driver ran out of gas. An ambulance was called, and Davies was pronounced dead at the nearest hospital. *Id.* at 765-66, 602 P.2d at 607.

83. *Id.* at 769, 602 P.2d at 609.

84. *Id.*

85. NEV. REV. STAT. § 41.141 (1979).

86. 95 Nev. 763, 770-71, 602 P.2d 605, 610 (1979).

87. *Id.* The court cited language from three Nevada cases defining wanton misconduct and ostensibly differentiating it from ordinary or gross negligence. Quoting from *Hart v. Kline*, 61 Nev. 96, 116 P.2d 672 (1941), the court said:

Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. *Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injury.*

95 Nev. 763, 770-71, 602 P.2d 605, 610 (1979) (emphasis added by the *Davies* court). Although the court refers to "reckless disregard of probable consequences," the conduct differentiated from gross negligence is willful and intentional conduct, rather than willful and wanton misconduct, willful misconduct, or recklessness.

88. 95 Nev. 763, 771, 602 P.2d 605, 610 (1979).

89. See *supra* note 87 for the emphasized portion of the language from *Hart v. Kline*, 61 Nev. 96, 116 P.2d 672 (1941), that the *Davies* court used to support its kind stance.

issue,⁹⁰ incorrectly distinguished *Bielski*⁹¹ and *Billingsley*,⁹² and presented Professor Schwartz' position on the issue in a somewhat misleading manner.⁹³ In the process, the court seriously undermined the quality of its opinion and further muddled the waters on the issue of recklessness for others seeking guidance from the opinion.

90. The *Davies* court incorrectly attributed to the decision of the California Supreme Court in *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), the dictum that "henceforth both gross negligence and willful or wanton misconduct would be subject to comparative negligence." *Davies*, 95 Nev. 763, 771-72, 602 P.2d 605, 610 (1979). The California court said no such thing, choosing, instead, to defer consideration of the question:

Two of the indicated areas (i.e., multiple parties and willful misconduct) are not involved in the case before us, and we consider it neither necessary nor wise to address ourselves to specific problems of this nature which might be expected to arise. As the Florida court stated with respect to the same subject, "it is not the proper function of this Court to decide unripe issues, without the benefit of adequate briefing, not involving an actual controversy, and unrelated to a specific factual situation."

Li v. Yellow Cab Co., 13 Cal. 3d 804, 826, 532 P.2d 1226, 1241-42, 119 Cal. Rptr. 858, 873-74 (1975) (quoting *Hoffman v. Jones*, 280 So. 2d 431, 439 (Fla. 1973)). The actual dictum to which the court referred, while perhaps indicative of a bias in the direction suggested by the *Davies* court, was largely equivocal:

The thought is that the difference between willful and wanton misconduct and ordinary negligence is one of kind rather than degree in that the former involves conduct of an entirely different order [footnote omitted], and under this conception it might well be urged that comparative negligence concepts should have no application when one of the parties has been guilty of willful and wanton misconduct. It has been persuasively argued, however, that the loss of deterrent effect that would occur upon application of comparative fault concepts to willful and wanton misconduct as well as ordinary negligence would be slight, and that a comprehensive system of comparative negligence should allow for the apportionment of damages in all cases involving misconduct which falls short of being intentional.

Li v. Yellow Cab Co., 13 Cal. 3d 804, 825-26, 532 P.2d 1226, 1241, 119 Cal. Rptr. 858, 873 (1975) (citing V. SCHWARTZ, *supra* note 7, § 5.3). The *Davies* court distinguished the *Li* opinion on the grounds that the California Supreme Court, in judicially adopting comparative fault, was not faced with the problem of determining legislative intent. *Davies*, 95 Nev. 763, 772, 602 P.2d 605, 610 (1979). For the reasons set forth above, the court had no need to distinguish *Li* because the California Supreme Court did not reach the question.

91. Pointing out that both *Billingsley* and *Bielski* had dealt with gross negligence, the *Davies* court concluded that "[t]he conclusion we reach today is consistent with the approach taken by these courts." *Davies*, 95 Nev. 763, 772, 602 P.2d 605, 611 (1979). This assertion is incorrect. The court ignored Wisconsin's application of the label "gross negligence" to the same conduct that in other jurisdictions is called "willful misconduct" (see *supra* notes 38-39). As a result, the court failed to appreciate the applicability of *Bielski* to the area of willful and wanton misconduct.

92. The *Davies* court said that the *Billingsley* court had concluded that willful and wanton negligence amounted to gross negligence in Arkansas and therefore should be subject to comparison under the statute. 95 Nev. 763, 772, 602 P.2d 605, 610 (1979). The court's reading of *Billingsley* is strained at best. Nowhere did the *Billingsley* court equate willful and wanton negligence with gross negligence (although there appears to be no reason that the court would have been adverse to such an equation). Rather, the court pointed to Arkansas opinions that equated willful misconduct and willful and wanton disregard with willful and wanton negligence. 365 F.2d 619, 623 (8th Cir. 1966). The point in *Billingsley*, apparently lost on the *Davies* court, was that willful misconduct (or willful and wanton disregard) is a type of negligence, not that there is no difference between willful or wanton negligence and gross negligence.

93. The *Davies* court substantiated its conclusion with the authority of Professor Schwartz' text:

As noted by V. Schwartz, *Comparative Negligence* § 5.3 (1974), to the extent that the concepts of willful and wanton misconduct or gross negligence were instituted merely to ameliorate the hardships of the contributory negligence rule, the rationale no longer applies under comparative negligence, but to the extent that they reflect a judgment that the defendant's culpability "is so close to intentional wrongdoing that he should not have the benefit of contributory negligence," the basis for the rule is unchanged by a comparative negligence system.

95 Nev. 763, 772, 602 P.2d 605, 611 (1979). The argument happens to be a very cogent one, but is not completely representative of Professor Schwartz' position. Schwartz merely asserts that if the circumstances are such as appear in this passage from *Davies*, "the courts are presented with a very difficult issue if the legislature has given no guidance." V. SCHWARTZ, *supra* note 7, § 5.3, at 105. Schwartz' view on how that issue should come out, expressed elsewhere in § 5.3, runs contrary to the view of the *Davies* court:

It is this author's view that the likelihood is slight that wanton or reckless conduct would be effectively deterred by complete loss of the contributory negligence defense. For this reason and because the core

F. Wyoming

The Supreme Court of Wyoming addressed the recklessness issue in *Danculovich v. Brown*,⁹⁴ a case brought under Wyoming's guest statute before that statute was declared invalid.⁹⁵ The trial court had removed the willful and wanton misconduct issue from the jury, which subsequently returned a verdict finding gross negligence on the part of the defendant and apportioned the negligence fifty-three percent to defendant and forty-seven percent to the decedent⁹⁶ (Wyoming, unlike Wisconsin, draws a distinction between gross negligence and willful and wanton misconduct).⁹⁷

It is significant that, as Justice Rose observed in his special concurrence, the issue of the role of willful misconduct under Wyoming's comparative fault system was not discussed in the trial court in *Danculovich*, nor was it briefed on appeal.⁹⁸ Rather, the supreme court appears to have raised the issue sua sponte. Justice Rose, criticizing this action by the majority, called the question "a 'straw-man' issue, set up so that the majority can knock it down and thereby establish binding principles for the future."⁹⁹

The court held that willful misconduct could not be compared with ordinary negligence under Wyoming's comparative negligence system because willful misconduct differs in kind, rather than degree, from ordinary negligence.¹⁰⁰ The court's sources for that assertion were Dean Prosser,¹⁰¹ a comment in the *Restatement (Second) of Torts*,¹⁰² and *Corpus Juris Secundum*.¹⁰³ The court's analysis of the issue is less than lucid. It suggests that the two types of fault differ in kind because willful misconduct approaches intentional conduct.¹⁰⁴ The court's language, however, appears to equate willful misconduct with intentional conduct:

Willful and wanton misconduct, in the strict sense, is not negligence, since it involves intent rather than inadvertence.

" . . . Willful misconduct is the *intentional* doing of something which should not be done, or *intentional* failure to do something which should be done. . . . It is *willfully* designed to accomplish a specific result, and is not aimless of purpose or regardless of results."¹⁰⁵

of comparative negligence is full apportionment on the basis of fault, courts should adopt the Wisconsin approach and should apportion damages when the plaintiff has been negligent and defendant's conduct falls short of being intentional even though defendant's conduct has been grossly negligent, reckless, or "willful negligent misconduct."

V. SCHWARTZ, *supra* note 7, § 5.3, at 108.

94. 593 P.2d 187 (Wyo. 1979).

95. WYO. STAT. § 31-5-1116 (1977), declared in *Nehring v. Russel*, 582 P.2d 67 (Wyo. 1978), to violate the guarantee of uniform operation of laws established by the Wyoming Constitution.

96. 593 P.2d 187, 190 (Wyo. 1979).

97. *Mitchell v. Walters*, 55 Wyo. 317, 100 P.2d 102 (1940).

98. 593 P.2d 187, 197-98 (Wyo. 1979) (Rose, J., specially concurring).

99. *Id.* at 198.

100. *Id.* at 193.

101. W. PROSSER, *supra* note 3, § 34, at 185.

102. RESTATEMENT (SECOND) OF TORTS § 500 comment g (1965).

103. 65 C.J.S. *Negligence* §§ 9(1)(b)-9(1)(c) (1966).

104. 593 P.2d 187, 193 (Wyo. 1979).

105. *Id.* (quoting *Mitchell v. Walters*, 55 Wyo. 317, 331, 100 P.2d 102, 106-07 (1940)) (emphasis added).

The court clarified this confusing language by saying that the intent in a case of willful and wanton misconduct is an intent to do or to fail to do an act (in reckless disregard of the consequences), not an intent to produce the consequences.¹⁰⁶ Nonetheless, the opinion would have been improved by the deletion, at least, of the language suggesting that willful misconduct is "willfully designed to accomplish a specific result."

G. Oklahoma

The reasoning in *Billingsley*¹⁰⁷ was adopted in 1980 by the U.S. District Court for the Western District of Oklahoma in *Amoco Pipeline Co. v. Montgomery*.¹⁰⁸ The court noted that the Oklahoma comparative negligence statute¹⁰⁹ was adopted from and was very similar to the Arkansas statute and that the Oklahoma Supreme Court had stated that it would be reasonable to look to Arkansas law for assistance in properly construing the statute.¹¹⁰

Based on this direction from the Oklahoma Supreme Court, the *Amoco* court looked to the interpretation of the Arkansas statute by the *Billingsley* court and elected to adopt it.¹¹¹ The court distinguished *Davies*¹¹² based on the presence of the words "gross negligence" in the Nevada statute interpreted in *Davies*.¹¹³ The court indicated, however, that its decision fundamentally was at odds with the *Davies* opinion, as well as with the Wyoming Supreme Court's opinion in *Danculovich*,¹¹⁴ due to differences on the kind-degree question and the proper role of recklessness within a system of comparative fault. The *Amoco* court sided with the *Billingsley* court on the kind-degree issue, saying that the rationale for the recklessness doctrine—the

106. 593 P.2d 187, 193 (Wyo. 1979). The court's language, taken from *Mitchell v. Walters*, 55 Wyo. 317, 100 P.2d 102 (1940), was:

The intent in willful and wanton misconduct is not an intent to cause the injury, but it is an intent to do an act, or an intent to not do an act, in reckless disregard of the consequences, and under such circumstances and conditions that a reasonable man would know, or have reason to know, that such conduct would, in a high degree of probability, result in substantial harm to another.

Danculovich, 593 P.2d 187, 193 (Wyo. 1979). Compare this language with the definition of "intent" in § 8A of the *Restatement (Second) of Torts*. Section 8A sets forth an alternative to its "desire" definition of intent, saying that an actor "intends" the consequences of his act not only if he "desires" them but also if he "believes that the consequences are substantially certain to result from it." *RESTATEMENT (SECOND) OF TORTS* § 8A (1965). Comment b to § 8A discusses this alternative definition, saying, "If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." *Id.* comment b. Although comment b goes on to describe recklessness as differing from this kind of intent in terms of the probability that the consequences will follow, it is clear that the line between the two is not well defined. The possible use of § 8A intent analysis as an alternative to recklessness for courts confronting the recklessness issue is discussed later in this Comment. *See infra* text accompanying notes 174-76.

107. *See supra* text accompanying notes 44-57.

108. 487 F. Supp. 1268 (W.D. Okla. 1980).

109. OKLA. STAT. ANN. tit. 23, §§ 13-14 (West Supp. 1981).

110. 487 F. Supp. 1268, 1272 (W.D. Okla. 1980). *See Laubach v. Morgan*, 588 P.2d 1071 (Okla. 1978).

111. 487 F. Supp. 1268, 1272 (W.D. Okla. 1980).

112. *See supra* text accompanying notes 76-93.

113. 487 F. Supp. 1268, 1270-71 (W.D. Okla. 1980).

114. *See supra* text accompanying notes 94-106.

amelioration of the hardships imposed by the harsh contributory negligence rule—had disappeared with the adoption of comparative negligence.¹¹⁵

H. Florida

In 1980 the case of *Bernard v. Florida East Coast Railway*¹¹⁶ nearly presented the Florida Supreme Court with an opportunity to address the question of the role of recklessness under the pure system of comparative fault¹¹⁷ it had adopted in *Hoffman v. Jones*.¹¹⁸ In *Bernard* the U.S. Court of Appeals for the Fifth Circuit certified the question of the role of recklessness to the Florida Supreme Court.¹¹⁹ The Florida Supreme Court never got an opportunity to address the question, however, because the case was settled before it was argued.¹²⁰

I. California

The question of the role of recklessness in a system of pure comparative fault has been litigated more extensively in California than in other states. In 1975 the California Supreme Court judicially adopted a system of pure comparative fault in *Li v. Yellow Cab Co.*¹²¹ In doing so the court specifically declined to decide the question of the role of recklessness (called "willful

115. 487 F. Supp. 1268, 1272 (W.D. Okla. 1980) (citing V. SCHWARTZ, *supra* note 7, § 5.3). It is interesting to note that the *Amoco* court misinterpreted the language of the California Supreme Court in *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), just as the Nevada Supreme Court had in *Davies v. Butler*, 95 Nev. 763, 602 P.2d 605 (1979) (see *supra* note 90). The *Amoco* court concluded that the *Li* court had decided the question of the future of willful misconduct in California. The *Amoco* court wrote, "The Supreme Court of California has likewise held that all conduct which falls short of being intentional is subject to comparative negligence." 487 F. Supp. 1268, 1271 (W.D. Okla. 1980). One would hope that this misperception of the existing law did not so alter the court's perception of the issue that it affected the outcome of the case.

116. 624 F.2d 552 (5th Cir. 1980).

117. American jurisdictions have adopted four major forms of comparative fault: pure comparative fault, two forms of partial comparative fault, and the slight-gross form of comparative fault. Pure comparative fault, first adopted by Mississippi in 1910, permits the comparison of fault and a plaintiff's recovery regardless of the percentage of contributory fault attributable to the plaintiff. See H. WOODS, *supra* note 17, §§ 4:1-4:2. In 1931 Wisconsin statutorily adopted a modified, partial form of comparative fault under which plaintiff's recovery was barred unless his degree of fault was less than that of the defendant. *Id.* §§ 4:1, 4:3. Under this approach, if plaintiff and defendant are found equally at fault, plaintiff's recovery is precluded. Arkansas, after a brief experiment with pure comparative fault, switched to this system in 1957. *Id.* This approach has been called the "Wisconsin-Arkansas Plan." Because Wisconsin subsequently changed its system to the more liberal one described immediately below, this first partial form is designated the Arkansas approach in this Comment. In 1969, reacting to a perceived unfairness of disallowing plaintiff's recovery when the parties are equally at fault, New Hampshire adopted a partial comparative fault statute permitting an equally negligent plaintiff to recover. *Id.* §§ 4:1, 4:4 (citing N.H. REV. STAT. ANN. § 507:7a (Supp. 1979)). Woods notes that there appears to be a trend toward the adoption of this New Hampshire type of comparative fault statute. H. WOODS, *supra* note 17, §§ 4:1, 4:4. A fourth type of system, variations of which exist in Nebraska, South Dakota, and Tennessee, provides for recovery by plaintiff when his negligence is slight and that of the defendant is gross. *Id.* §§ 4:1, 4:5.

118. 280 So. 2d 431 (Fla. 1973).

119. 624 F.2d 552, 556 (5th Cir. 1980).

120. Telephone interview with Marjorie D. Gadarian of Jones and Foster, West Palm Beach, Florida, attorneys for defendant-appellant cross appellee (Jan. 26, 1982).

121. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

misconduct" or "willful and wanton misconduct" by the California courts).¹²² The omission of a specific holding notwithstanding, the court, in dictum, did give an indication that it was leaning in the direction of comparing willful and wanton misconduct with ordinary negligence. Recognizing but discounting the significance of the kind-degree distinction, the court said:

The thought is that the difference between willful and wanton misconduct and ordinary negligence is one of kind rather than degree in that the former involves conduct of an entirely different order, [footnote omitted] and under this conception it might well be urged that comparative negligence concepts should have no application when one of the parties has been guilty of willful and wanton misconduct. It has been persuasively argued, however, that the loss of deterrent effect that would occur upon application of comparative fault concepts to willful and wanton misconduct as well as ordinary negligence would be slight, and that a comprehensive system of comparative negligence should allow for the apportionment of damages in all cases involving misconduct which falls short of being intentional.¹²³

In *Kindt v. Kauffman*,¹²⁴ a dramshop case,¹²⁵ the California Court of Appeal (Third District) concluded that recklessness should not be compared with ordinary negligence under California's comparative fault system.¹²⁶ Kindt was a tavern customer who sued the tavern's owner under California's dramshop law¹²⁷ for injuries he sustained in an automobile accident after leaving the tavern.¹²⁸ The appeals court, in a 2-1 decision, affirmed the trial court's dismissal of the case on defendant's demurrer.¹²⁹ The rationale for the court's decision is somewhat difficult to grasp. The court commenced its discussion by stating, and apparently misrepresenting, the position of the California Supreme Court expressed in *Li*. The court deleted from its opinion the crucial *Li* language suggesting the direction in which the supreme court was leaning on the willful misconduct issue, leaving only language that created the impression that the supreme court was leaning in the opposite direction.¹³⁰

122. The court's language was: "[I]t is not the proper function of this Court to decide unripe issues, without the benefit of adequate briefing, not involving an actual controversy, and unrelated to a specific factual situation." *Id.* at 826, 532 P.2d at 1241-42, 119 Cal. Rptr. at 873-74.

123. *Id.* at 825-26, 532 P.2d at 1241, 119 Cal. Rptr. at 873.

124. 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (Ct. App. 1976).

125. A dramshop case is an action by an injured third party, and in some cases (as in *Kindt*) an injured patron, against a liquor seller for selling liquor to a patron who subsequently caused injury. See generally 45 AM. JUR. 2D *Intoxicating Liquors* §§ 562-614 (1969), for a discussion of dramshop actions.

126. 57 Cal. App. 3d 845, 847, 129 Cal. Rptr. 603, 604 (Ct. App. 1976).

127. CAL. BUS. & PROF. CODE § 25602 (West Supp. 1981).

128. 57 Cal. App. 3d 845, 847, 129 Cal. Rptr. 603, 604 (Ct. App. 1976).

129. *Id.*

130. The *Kindt* court, in summarizing the view expressed in the *Li* opinion, deleted the second half of the quote reproduced in the text above regarding willful misconduct, informing the reader only that the supreme court had alluded to the kind-degree distinction and had stated, "[I]t might well be urged that comparative negligence concepts should have no application when one of the parties has been guilty of willful and wanton misconduct. . . ." 57 Cal. App. 3d 845, 852, 129 Cal. Rptr. 603, 607 (Ct. App. 1976) (emphasis and ellipsis added by the *Kindt* court).

The discussion in *Kindt* of the willful misconduct issue is buried in its analysis of the tavern owner's duty of care to his customer. Indeed, a close reading of the case suggests that the court's determination regarding willful misconduct was dictated by its conclusion that a tavern owner owes no duty to his intoxicated customer.¹³¹ The court, in discussing the duty of care owed a customer by the tavern owner, cited *Raymond v. Paradise Unified School District*¹³² and *Amaya v. Home Ice, Fuel & Supply Co.*¹³³ for the factors to be considered in a duty determination. It then proceeded, using those factors—administrative, moral, and socioeconomic considerations—to determine that no duty exists.

The court then moved to its discussion of willful misconduct. The court's summary of its conclusions, however, reveals that its determinations regarding willful misconduct were based on exactly the same considerations as its conclusions regarding duty:

*The moral and socio-economic factors however lead us to the conclusion that the requisite duty of the tavern owner to the drunken patron does not exist, that the comparative negligence doctrine of Li does not apply to willful misconduct, and that the Vesely v. Sager rule does not extend to injuries to the drunken patron himself.*¹³⁴

Focusing on "moral and socio-economic factors," the court drew an analogy to illegal drag racing and concluded that the same reasons that would compel denial of recovery to a reckless party in that context were applicable to the case at bar.¹³⁵ The court asserted that to hold comparative negligence applicable to willful misconduct would amount to "governmental paternalism" that would award a "pure and simple financial windfall to an undeserving plaintiff," which would be "in [the court's] view morally indefensible."¹³⁶

The holding of the *Kindt* court was followed in two subsequent California dramshop cases at the appellate level, *Trenier v. California Investment and Development Corp.*¹³⁷ and *Sissle v. Stefenoni*.¹³⁸ It was criticized (and argu-

131. 57 Cal. App. 3d 845, 855, 129 Cal. Rptr. 603, 610 (Ct. App. 1976).

132. 218 Cal. App. 2d 1, 31 Cal. Rptr. 847 (Ct. App. 1963).

133. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

134. 57 Cal. App. 3d 845, 855, 129 Cal. Rptr. 603, 610 (Ct. App. 1976) (emphasis added). In *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971), cited here by the *Kindt* court, the California Supreme Court partially abrogated the common-law rule that prohibited suits by patrons or injured third parties against liquor sellers for injuries caused by patrons who had been served too much liquor. The *Vesely* rule, which extended only to injuries to third parties, was legislatively overruled, along with other decisions that had extended the rule's coverage, by the California legislature in a 1978 amendment to the California Business and Professions Code that specifically mentioned *Vesely* and two other decisions. CAL. BUS. & PROF. CODE §§ 25602-25602.1 (West Supp. 1981) (The 1978 amendments were upheld against constitutional attack by the California Supreme Court in a 1981 opinion sharply critical of the form and substance of the amendments. *Cory v. Shierloh*, 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981).).

135. 57 Cal. App. 3d 845, 856, 129 Cal. Rptr. 603, 610 (Ct. App. 1976).

136. *Id.* at 856-57, 129 Cal. Rptr. at 610-11.

137. 105 Cal. App. 3d 44, 164 Cal. Rptr. 156 (Ct. App. 1980).

138. 88 Cal. App. 3d 633, 152 Cal. Rptr. 56 (Ct. App. 1979).

ably overruled),¹³⁹ however, by the California Supreme Court in *Ewing v. Cloverleaf Bowl*,¹⁴⁰ another dramshop case.¹⁴¹

A different group of California courts of appeal, along with the Ninth Circuit, have taken a different view of the question in a series of more recent cases. These courts have held that willful misconduct is comparable with ordinary negligence under California's system of comparative fault.¹⁴²

In *Sorensen v. Allred*¹⁴³ the Fifth District Court of Appeal rejected the analysis of recklessness as fault differing in kind from ordinary negligence and held recklessness (willful and wanton misconduct) comparable with ordinary negligence.¹⁴⁴ The Second District Court of Appeal adopted the *Sorensen* approach in *Southern Pacific Transportation Co. v. State*,¹⁴⁵ a case involving contribution between joint tortfeasors. The *Southern Pacific* court held that the need for the recklessness doctrine had disappeared with the adoption of comparative fault and that "[t]he concept of willful misconduct remains viable only for an intentional injury which justifies punitive damages."¹⁴⁶ While the court's choice of words here is poor (suggesting that intentional conduct might properly be labeled reckless instead of intentional), its decision to eliminate recklessness does appear clear.

In *Plyler v. Wheaton Van Lines*¹⁴⁷ the Ninth Circuit was confronted with a diversity case in which at least one of the parties in a traffic accident had been guilty of willful misconduct. The court, applying California law, elected to follow *Sorensen*, saying that *Sorensen* merely stated formally "what was the logical and predictable result of the adoption of comparative fault."¹⁴⁸ In *Zavala v. Regents of the University of California*,¹⁴⁹ a case involving self-inflicted injury to an intoxicated partygoer, the Second District Court of Appeal rejected the viability of the recklessness doctrine. Citing *Sorensen*,

139. The *Kindt* court's determination on the willful and wanton misconduct issue was based on exactly the same considerations as its determinations regarding duty. See *supra* text accompanying notes 130-34. In footnote 8 in its opinion in *Ewing v. Cloverleaf Bowl*, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978), the California Supreme Court expressly rejected the *Kindt* finding that bartenders owe no duty of care to their patrons. Inasmuch as both the duty and recklessness determinations of the *Kindt* court were based on exactly the same factors, the *Ewing* case seriously undermines and may overrule *Kindt*. Indeed, Professor Schwartz, for an unspecified reason, believes that *Kindt* was overruled by *Ewing*. See V. SCHWARTZ, *supra* note 7, § 5.5, at 49 n.71 (Supp. 1981).

140. 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

141. The dramshop cause of action was legislatively eliminated (for nonminors) in California in 1978, effective January 1, 1979, See *supra* note 134.

142. Compare *supra* note 1. California's system may truly be said to be a comparative fault, as opposed to a comparative negligence, system. The decision of the California Supreme Court in *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978), to allow strict products liability to be compared by a fact finder with ordinary negligence means, ipso facto, that the California scheme is not one that compares negligence exclusively.

143. 112 Cal. App. 3d 717, 169 Cal. Rptr. 441 (Ct. App. 1980).

144. *Id.* at 725-26, 169 Cal. Rptr. at 446.

145. 115 Cal. App. 3d 116, 171 Cal. Rptr. 187 (Ct. App. 1981).

146. *Id.* at 121, 171 Cal. Rptr. at 190-91.

147. 640 F.2d 1091 (9th Cir. 1981).

148. *Id.* at 1093.

149. 125 Cal. App. 3d 646, 178 Cal. Rptr. 185 (Ct. App. 1981).

Southern Pacific, and *Plyler*, the court allowed recovery, stating that with the abolition of contributory negligence the recklessness classification served no purpose.¹⁵⁰

The California Supreme Court has yet to decide the question of the role of recklessness in its system of comparative fault. Given its language in *Li*, however, along with the holdings of the *Sorensen*, *Southern Pacific*, *Plyler*, and *Zavala* courts, it appears probable that the court will either overrule *Kindt* and its progeny or carve out some narrow area of reckless conduct in which the *Kindt* holding would apply.¹⁵¹

V. THE UNIFORM COMPARATIVE FAULT ACT: ANOTHER ALTERNATIVE

The Uniform Comparative Fault Act,¹⁵² proposed for adoption by the National Conference of the Commissioners on Uniform State Laws, deals with the recklessness question in a manner roughly consistent with the approach of the degree courts. The proposed Act (yet to be adopted by any U.S.

150. *Id.* at 650-51, 178 Cal. Rptr. at 187.

151. Given the rather strong language used by the court in *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978), in favor of apportioning liability based exclusively on degrees of fault, its favorable citation of the Uniform Comparative Fault Act to the same effect (*see infra* text accompanying notes 156-58), and the support the court has expressed for the dramshop cause of action (*see supra* note 134), it is much less than certain that the court will uphold the *Kindt* finding when it is finally confronted with the question. Of course, given the California legislature's 1978 abrogation of the *Kindt* cause of action, *see supra* note 134, the question is largely moot. In a California law supplement to his text on comparative negligence, V. SCHWARTZ, *supra* note 7, Professor Schwartz wrote, "It seems probable that the California [Supreme] Court will handle the matter of the reckless or willful and wanton defendant the same way it specifically said it would handle last clear chance: let the jury consider the facts and apportion damages." *Id.* at 5. (Note, however, that Professor Schwartz' comment does not reach the reckless plaintiff in *Kindt*.) If the California Supreme Court elects, notwithstanding the foregoing, to give *Kindt* some continuing viability, two vehicles it might employ to achieve this result, discussed later in this Comment, would be to:

(1) Declare both of the parties in a dramshop action to be reckless (as did the *Kindt* court) and, using the *in pari delicto potior est conditio defendentis* maxim of the common law, leave the parties as it finds them and deny recovery. This possibility is alluded to by Professor Fleming in a legislative study entitled *Report to the Joint Committee of the California Legislature on the Problems Associated With American Motorcycle Association v. Superior Court*, 30 HASTINGS L.J. 1464, 1479 (1979). Fleming, while recommending the comparison of ordinary negligence with recklessness, labeled this issue as one of policy that "might well be left to the courts to work out on an *ad hoc* basis." *Id.* Given the strength with which the California Supreme Court in *Ewing v. Cloverleaf Bowl*, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978), said that the determinations of recklessness in cases involving intoxication are questions of fact, it appears less than certain that the court will choose this option. Indeed, in footnote 10 in its discussion in *Ewing*, the court expressly overruled the *Kindt* finding that consuming alcohol to the point of intoxication constitutes willful misconduct as a matter of law. But see *Taylor v. Superior Court*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979), in which a four-member majority held that one who voluntarily becomes intoxicated knowing from the outset that he must thereafter operate a motor vehicle may be held to be guilty of willful or wanton misconduct. *Id.* at 899, 598 P.2d at 859, 157 Cal. Rptr. at 699. *Taylor* may likely be held controlling in the *Kindt* context: it involved drinking and driving; *Ewing* involved intoxication alone.

(2) Declare the customer's conduct in drinking to excess and in then attempting to drive to be intentional conduct consistent with the definition of intent in RESTATEMENT (SECOND) OF TORTS § 8A (1965). *See infra* text accompanying notes 174-75. The conduct, being intentional, would be beyond the scope of even California's comparative fault scheme. Again, given the language of *Ewing* and *Taylor*, it is unclear whether the California Supreme Court will be willing to assume the fact finder's role in this context in order to make this determination as a matter of law.

152. 12 U.L.A. 33 (1982).

jurisdiction) embodies a pure system of comparative fault¹⁵³ under which the claimant's recovery is diminished by the proportion of fault attributable to him.¹⁵⁴

The Act contains a very broad definition of fault, including not only acts or omissions that are in any measure negligent or reckless, but also, *inter alia*, strict liability, breach of warranty, and unreasonable assumption of risk.¹⁵⁵ Thus, the Act eliminates a host of all-or-nothing rules and provides for comparisons of reckless conduct not only with ordinary negligence and other reckless conduct but with a variety of other types of fault as well.

While the proposed Act has yet to be legislatively adopted in any state, it has been favorably cited in a number of court decisions. Of particular significance is the citation of the proposed Act by the California Supreme Court in *Daly v. General Motors Corp.*¹⁵⁶ In *Daly* the California court held strict products liability comparable with ordinary negligence under California's comparative fault scheme.¹⁵⁷ After quoting section 1 of the Act, which contains the portions cited above, the court continued:

While lacking any legislative sanction the Act, in our view, points in the direction of a responsible national trend. As such, section 1 is revealing in two notable respects: in its clear definitional expression in subsection (b) that comparative principles are to be applied to cases of "strict tort liability," and in its substitution of the broad generic term "fault," in subsection (a), as including both negligence and strict liability.¹⁵⁸

While the *Daly* court dealt only with strict liability, it is significant that the sections of the Act the court quoted are equally applicable to recklessness as well.

153. See *supra* note 117 for a discussion of pure comparative fault.

154. Section 1(a) of the proposed Act provides:

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

UNIF. COMP. FAULT ACT § 1(a), 12 U.L.A. 34 (1982).

155. Section 1(b) contains the proposed Act's definition of fault:

"Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Id. § 1(b).

156. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

157. *Id.* at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390.

158. *Id.* at 741-42, 575 P.2d at 1172, 144 Cal. Rptr. at 390.

VI. DISCUSSION

A. *Problems With Present Approaches*

The review presented above of the cases that have dealt with the role of recklessness demonstrates the significant confusion and disagreement that exist regarding the appropriate function for the doctrine in developing systems of comparative fault. While some cases in this area have turned on matters of statutory construction,¹⁵⁹ in large measure the courts have been guided in their ultimate decisions by their differing conceptions regarding the nature of recklessness—that is, whether it is fault of an entirely different kind from ordinary negligence, or whether it is negligence that is simply of a more exaggerated degree. Indeed, for most of the courts considering this question, the kind-degree distinction was a crucial, if not dispositive, factor.

The troublesome aspect of most of the cases that have considered the matter is the courts' tendency to treat the question in largely conclusory fashion, relying on or rejecting out of hand prior case law holding that the two types of fault differ in kind (or, in the case of the *Billingsley v. Westrac Co.*¹⁶⁰ court, degree). The temptation to engage in such a conclusory analysis is significant. No set guidelines exist for courts to consider in determining the future of a liability-limiting negligence doctrine. The kind-degree distinction perhaps is also appealing because whichever course a court chooses, its decision is difficult to assail; ultimately, there is no demonstrably correct alternative, and the distinction is largely rhetorical.

B. *An Alternative Model For Analysis*

What, then, is the alternative to a conclusory reliance on the kind-degree distinction in assessing the proper role of recklessness under a system of comparative fault? The ultimate answer lies in an examination of the policies underlying the recklessness doctrine as well as those underlying the adoption of comparative fault. Before reaching this stage of the analysis, however, two threshold considerations that may affect the result should be examined.

1. *Threshold Considerations*

A court confronting the recklessness issue first should undertake a thorough review of the legislation, legislative history, or judicial pronouncement adopting comparative fault for the jurisdiction. If any of these sources sug-

159. See *Davies v. Butler*, 95 Nev. 763, 602 P.2d 605 (1979) (see *supra* text accompanying notes 76-93); *Johnson v. Tilden*, 278 Or. 11, 562 P.2d 1188 (1977) (see *supra* text accompanying notes 66-71).

160. 365 F.2d 619 (8th Cir. 1966) (see *supra* text accompanying notes 44-57).

gests an obvious result, it should be considered dispositive. Other less definite indications of intent contained in these materials should be viewed as persuasive authority.

Second, the identity of the party who allegedly is reckless should be considered. There are three possible combinations of reckless parties, given our exclusion of multiple-party litigation from the scope of this Comment: defendant reckless, plaintiff negligent; plaintiff reckless, defendant negligent; and both parties reckless. Two of these three combinations, the two involving reckless plaintiffs, pose special problems that should be considered at the outset of a court's examination of the recklessness issue.

In the case of a reckless plaintiff and a negligent defendant, comparison of fault by a fact finder is much less appropriate in a partial, as opposed to a pure, comparative fault jurisdiction.¹⁶¹ If we assume that a reckless party's share of the blame in a two-party action always will exceed that of the non-reckless party, the issue of division of damages might be removed from the fact finder in a partial comparative fault jurisdiction upon a finding that the plaintiff was reckless. In a pure comparative fault jurisdiction the identity of the reckless party should not be a factor in deciding the future of recklessness.

When both parties are found to have been reckless, the court is presented with a different problem altogether. In such a case the court should examine the extent to which it has in the past employed doctrines such as *ex turpi causa non oritur actio*¹⁶² and *in pari delicto potior est conditio defendentis*¹⁶³ to deny recovery and leave mutually guilty parties as the court finds them.¹⁶⁴ The court then should balance the policies underlying this treatment of mutually guilty parties against the extent to which the jurisdiction's comparative fault system exists to assess liability according to fault, however egregious that fault might be.

2. Examination of Underlying Policy—The Heart of an Effective Analysis

Absent a disposition based on the threshold factors set out above, a court confronting the recklessness issue should move next to a consideration of the policies underlying both the existence of the recklessness doctrine and the adoption of comparative fault in the jurisdiction. It will be shown here that the court's ultimate determination regarding the role of recklessness should rest upon a balancing of two possibly competing factors: (a) The extent to which the jurisdiction's recklessness doctrine reflects a judgment that reck-

161. See generally V. SCHWARTZ, *supra* note 7, §§ 3.2, 3.5, for a discussion of pure and partial comparative fault systems. See also *supra* note 117.

162. "Out of an illegal consideration, an action can not arise." BLACK'S LAW DICTIONARY 529 (rev. 5th ed. 1979).

163. "In a case of mutual fault, the condition of the defendant is the better one," or "where the fault is mutual, the law will leave the case as it finds it." *Id.* at 711.

164. See Appleman, *Wilful and Wanton Conduct in Automobile Guest Cases*, 13 IND. L.J. 131, 148-51 (1937), for an earlier discussion of this idea as it applies in automobile guest statute cases.

less parties should bear the entire brunt of their loss because their conduct approximates intent, and (b) The extent to which the jurisdiction's comparative fault scheme exists to apportion liability equitably according to fault.

a. Policies Underlying the Recklessness Doctrine

The advent of the recklessness doctrine occurred in large measure as a reaction to the inequity of the contributory negligence bar.¹⁶⁵ The courts needed some rationale for allowing recovery in cases in which a negligent plaintiff sued a reckless defendant—something more than a mere assertion that precluding recovery was unfair. Thus was born the conception that recklessness differed in kind from ordinary negligence. Courts apparently felt much more comfortable fastening a reckless defendant with total liability once they had discovered that his fault was not only more severe, but also was of an entirely different order than negligence.

Based on this historical analysis, it might be argued that the kind-degree distinction is but an anachronistic vestige of a legal fiction that has ceased to serve a useful purpose under modern systems of comparative fault. With the adoption of comparative fault, the inequity of the contributory negligence bar, and therefore the rationale for the different-kind-of-fault fiction, arguably has disappeared. Indeed, this view is the basis of the approach taken by many of the courts viewing recklessness as negligence differing from ordinary negligence only in degree.¹⁶⁶

Alternatively, some authorities have suggested a second reason for both the adoption and the retention of the recklessness doctrine: a judgment that the reckless party's state of mind so closely approximates intent that he should be treated in the same manner as one guilty of an intentional tort—he should not have the benefit of using his opponent's contributory negligence to mitigate his liability.¹⁶⁷ As Professor Schwartz has observed, when both of these rationales underlie a recklessness system in a particular jurisdiction, the adoption of comparative fault eliminates the first one—amelioration of the severity of contributory negligence. The second rationale, however, remains—a judgment that complete liability should attach to parties whose state of mind is felt so closely to approximate intent that they should not be accorded the opportunity to use their opponents' contributory negligence to mitigate their liability.¹⁶⁸ Indeed, a few of the courts adhering to the conception that negligence differs from recklessness in kind have used this proximity-to-intent

165. See V. SCHWARTZ, *supra* note 7, § 5.3, at 105. See also H. WOODS, *supra* note 17, § 1:6.

166. See, e.g., *Amoco Pipeline v. Montgomery*, 487 F. Supp. 1268 (W.D. Okla. 1980) (see *supra* text accompanying notes 107–15); *Southern Pac. Transp. Co. v. State*, 115 Cal. App. 3d 116, 171 Cal. Rptr. 187 (Ct. App. 1981) (see *supra* text accompanying notes 145–46).

167. See W. PROSSER, *supra* note 3, § 34, at 184–85; V. SCHWARTZ, *supra* note 7, § 5.3, at 105.

168. V. SCHWARTZ, *supra* note 7, § 5.3, at 105.

analysis as a principal element of their decisions.¹⁶⁹ The rationale for continuing to use the proximity-to-intent formulation embodies considerations of judicial economy, deterrence,¹⁷⁰ and perhaps even an element of retribution.¹⁷¹

On the recklessness side of the equation, then, the court must weigh two possibly conflicting elements. To the extent that recklessness is seen as existing solely to mitigate the harshness of contributory negligence, the doctrine has no further utility once comparative fault is adopted, and therefore, it should be discarded. To the extent, however, that recklessness is seen as embodying a judgment that the actor's state of mind so closely approximates intent that he ought to bear the total loss, retention of recklessness as an all-or-nothing doctrine may be appropriate.

b. *Policies Underlying the Adoption of Comparative Fault*

After fully considering the reasons for the existence of recklessness in the jurisdiction and determining the extent to which it is grounded on a proximity-to-intent rationale, courts confronting the recklessness issue next should examine the policies underlying the adoption of comparative fault in the jurisdiction.

Unfortunately, in most jurisdictions there exists little in the way of legislative history to suggest the reasons that comparative fault systems were adopted.¹⁷² In many instances, therefore, the courts will be forced to use their common-law authority to interpret the existing legislation (or judicial opinions adopting comparative fault) in light of what they believe were or should have been the reasons for the adoption of comparative fault.

To the extent that comparative fault was adopted or continues to exist to apportion loss equitably according to the relative degrees of fault that caused it, recklessness (arguably a subset of fault) should be compared with ordinary negligence (clearly fault). If, on the other hand, it appears clear that the adoption of comparative fault in the jurisdiction did not carry with it a judgment that liability ought to be apportioned according to degrees of fault caus-

169. See, e.g., *Draney v. Bachman*, 138 N.J. Super. 503, 351 A.2d 409 (Super. Ct. Law Div. 1976) (see *supra* text accompanying notes 58-65); *Davies v. Butler*, 95 Nev. 763, 602 P.2d 605 (1979) (see *supra* text accompanying notes 76-93).

170. Professor Schwartz' observation (endorsed by the California Supreme Court in *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 825-26, 532 P.2d 1226, 1241, 119 Cal. Rptr. 858, 873 (1975)), that the loss of any deterrent effect occasioned by the adoption of comparative fault would be slight (see V. SCHWARTZ, *supra* note 7, § 5.3, at 103) is a cogent one. Assuming that the deterrence element is less than crucial, the relevant policy factors become judicial economy and retribution.

171. "Retribution" is used here to connote the equivalent of "getting back at" a reckless party out of a sense of indignation or outrage at his conduct. It is analogous to the "moral factors" formulation employed by the California Court of Appeals in *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (Ct. App. 1976) (see *supra* text accompanying notes 124-36). Although not applied particularly well in that case, the idea that recovery might be denied when it simply shocks the conscience of a reasonable man has some merit and should be considered.

172. V. SCHWARTZ, *supra* note 7, § 5.3, at 107.

ing it, comparison of recklessness with ordinary negligence may be less appropriate.

One factor that should be examined at this stage as indicative of intent to assess liability in proportion to fault is the extent to which the system, given its history and judicial interpretation, appears truly to be a system of comparative fault rather than exclusively a system of comparative negligence.¹⁷³ To the extent that the system is one of comparative fault, it is much more appropriate that recklessness be compared with ordinary negligence. Indications that the system is in fact one that compares fault (a broader term than negligence), rather than merely negligence, include the use of the word "fault" in the statute, judicial pronouncements, or legislative history, as well as the prior application of the jurisdiction's comparative negligence scheme to other types of conduct—notably strict liability—that clearly are not negligence-based.

c. The Solution: A Balancing of Possibly Conflicting Policies

After considering the reasons underlying the adoption of comparative fault in the jurisdiction, the court should balance these against the policies underlying the jurisdiction's recklessness doctrine. In the process the court should avoid to whatever extent possible labeling recklessness as differing in kind or degree from ordinary negligence.

On the recklessness side of the equation, the element militating in favor of the comparison of recklessness with ordinary negligence is the extent to which the jurisdiction's recklessness doctrine exists to mitigate the harshness of contributory negligence and has been rendered obsolete by the adoption of comparative fault. The element militating against comparison is the extent to which the recklessness doctrine carries with it a judgment that the reckless party's state of mind so closely approximates intent that he should bear the totality of the loss. On the comparative fault side of the equation, the element militating in favor of comparisons between recklessness and ordinary negligence is the extent to which the jurisdiction's comparative fault system exists to assess liability equitably in proportion to the contributing fault. The element militating against comparison on this side is the extent to which the jurisdiction's comparative fault system may have been created for some other inconsistent purpose.

Ultimately, it is a balancing of these two sets of policies, in the event they conflict, that should produce a well-reasoned decision as to the appropriate future role of recklessness within the context of a particular jurisdiction's system of comparative fault.

173. See *supra* note 1 for a description of the distinction between comparative negligence and comparative fault.

3. A Possible Alternative

One alternative to the retention of recklessness for certain types of particularly egregious fault—one that would allow a court to relegate the kind distinction to the judicial junk heap while precluding the use of the judicial system by certain very reckless parties—would be to declare the conduct in question to be intentional, rather than reckless. This approach, of necessity, would rely heavily on the definition of intent employed by the drafters of the *Restatement (Second) of Torts*. Section 8A of the *Restatement* defines intent as a state of mind whereby “the actor *desires* to cause consequences of his act, or . . . *believes that the consequences are substantially certain to result from it.*”¹⁷⁴ While this formulation does differ in significant ways from the *Restatement’s* definition of recklessness,¹⁷⁵ it is sufficiently broad that courts could employ it effectively to deny recovery to certain parties seen as being guilty of egregiously reckless conduct.¹⁷⁶

The advantage of employing this alternative is that only certain highly reckless parties would be denied the opportunity to have their fault compared. Other much less guilty parties still could take advantage of comparative fault, even though a fact finder, using what often is a very nebulous instruction, had labeled their conduct “reckless.”

VII. CONCLUSION

An examination of judicial attempts to define the proper role of recklessness in American systems of comparative fault reveals the significant confusion and disagreement that surround the issue. Much of the problem stems from a tendency on the part of courts dealing with the issue to rely in conclusory fashion on prior case law establishing artificial distinctions between negligence and recklessness based on conceptions that the two forms of conduct differ in kind or degree. At least some of the confusion in this area would be removed if courts would eliminate the kind-degree distinction from their judicial vocabulary and focus instead on the policies underlying recklessness and comparative fault.

A court dealing with the recklessness issue first should address the threshold issues of the existence of dispositive legislation or legislative history and the various considerations raised by the identity of the allegedly reckless party (plaintiff, defendant, or both). Next, the court should balance the policies underlying the jurisdiction’s recklessness doctrine against those underlying the jurisdiction’s adoption of comparative fault. In balancing these policies, the court first should consider whether the recklessness doctrine in the

174. RESTATEMENT (SECOND) OF TORTS § 8A (1965) (emphasis added).

175. See *id.* § 500.

176. This is not to suggest that this determination be made as a matter of law. Certainly, jury instructions embodying the *Restatement* approach easily could be formulated.

jurisdiction appears to exist to ameliorate the severity of the contributory negligence rule (in which case it no longer serves a purpose under comparative fault and comparison should be allowed) or whether it reflects a judgment that the reckless party's conduct so closely resembles intent that he should not have the benefit of contributory negligence (in which case continuation of the all-or-nothing effect of recklessness may be appropriate). Second, the court should consider the extent to which, in its judgment, the system of comparative fault in the jurisdiction exists to apportion liability according to fault. To the extent that this is judged to be the aim of the jurisdiction's comparative fault scheme, the comparison of recklessness with ordinary negligence will be increasingly appropriate.

Jim Hasenfus

